Supreme Court, U.S.
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No. 93-1931

In The

Supreme Court of the United States

October Term, 1993

ROY LEE FOWLER,

Petitioner,

vs.

WAYNE VANMETER, DAVID H. KERR, and the CITY OF WEST POINT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS AND JUDGMENT BELOW

Within the Appendix to the Petition for Writ of Certiorari Petitioner [hereinafter referred to as "Fowler"] has provided the Order of the Honorable G. Ernest Tidwell, Judge, United States District Court for the Northern District of Georgia [hereinafter referred to as the "district court"], entered on April 21, 1993. Fowler also includes in his Appendix the January 20, 1994 decision of the United States Court of Appeals for the Eleventh Circuit [hereinafter referred to as the "Eleventh Circuit"] in *Fowler v. VanMeter, et al.*, No. 93-8547, (per curium) (11th Cir. 1994), and that court's denial of Fowler's Petition for Rehearing, dated February 23, 1994.

STATEMENT OF JURISDICTION

Respondents agree with Fowler's Statement of Jurisdiction. Respondents additionally show that jurisdiction is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondents show that this action involves claims that were brought under the Fourteenth Amendment to the Constitution of the United States pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

With but one exception, Respondents agree with the "Proceedings and Dispositions Below" portion of Fowler's Statement of the Case. Respondents do take issue with Fowler's statement that, in part, the basis of his complaint in the district court was his "arrest." To the contrary, the only ground for recovery advanced by Fowler in the district court and before the Eleventh Circuit was that Respondents were responsible for the destruction of evidence alleged to be exculpatory in nature, subsequent to his arrest, thus resulting in his being convicted for driving while under the influence of alcohol [hereinafter referred to as "DUI"]. (R-1, ¶¶ 19, 20.) At no time has Fowler ever raised any issue concerning the propriety of his "arrest," nor does it appear, despite the improvident reference thereto in his Petition, that he is raising this issue now.

Respondents also have very little disagreement over the content of the "Statement of the Facts" portion of Fowler's Statement of the Case. However, two (2) matters warrant explanation and comment.

On August 29, 1989, Fowler was pulled over for routine traffic violations by Respondent Wayne VanMeter [hereinafter referred to as "VanMeter"] of the West Point Police Department. Because VanMeter smelled alcohol upon Fowler's breath, VanMeter then subjected Fowler to two (2) field sobriety tests. Fowler failed both. (R-11, Deposition of Wayne VanMeter [hereinafter "VanMeter depo."], pp. 12-16; R-10, Certified Copy of Criminal Trial Transcript of *State v. Fowler* [hereinafter "Criminal Trial Transcript"], pp. 8-9.) In Fowler's Petition, Fowler now

disputes that he failed these tests. (Petition, p. 17.) Yet, Fowler's own deposition testimony is clear and to the contrary. (R-11, VanMeter depo., pp. 16, 77, 112, 114-18.)

The second matter requiring clarification is Fowler's depiction of what occurred at his DUI trial. Fowler explains he first learned of the possible existence of the allegedly exculpatory tape during his cross-examination of VanMeter at the trial. This is followed by the statement that "over objection of counsel for Mr. Fowler, evidence of the breath analysis was submitted to the jury as evidence." By this statement, Fowler seems to imply that his lawyer objected to the admission of the breath analysis because of the possible existence of the tape. He did not. Rather, the objection was based solely on the issue of whether the officer operating the intoximeter was state certified on the machine in question. (R-10, Criminal Trial Transcript, pp. 22-49.) The objection had nothing to do with the alleged failure of VanMeter to read Fowler his implied consent warning, or any other issue surrounding the existence of the audio tape of the traffic stop which led to Fowler's arrest and conviction.

SUMMARY OF THE ARGUMENT

Fowler's Petition for Writ of Certiorari should be denied. First and foremost, not one of the five (5) questions Fowler presents for review was raised in either the district court or in the Eleventh Circuit. This Court has long held that it is only in the most exceptional case that issues not presented below will be reviewed by this Court. This is not such an exceptional case.

Second, questions 2 through 5 set forth more the musings and frustrations of a losing party than they do the kind of meaty issues appropriate for appellate review. The record clearly shows the district court correctly applied the law concerning summary judgment and properly granted Respondents' motion.

Third, with respect to the first question Fowler presents for review, the fact is that district courts *are* authorized to enter summary judgment on issues not raised by the moving party if the record otherwise shows there is no genuine issue of material fact for trial. *Broderick Wood Products Company v. United States,* 195 F.2d 433 (10th Cir. 1952); *Board of National Missions of Presbyterian Church in the United States v. Smith,* 182 F.2d 362 (7th Cir. 1950); *Wisnouse v. Telsey,* 367 F. Supp. 855 (S.D.N.Y. 1973). At the same time, Respondents show that in fact, the district court did not grant Respondents' motion on the basis of an issue which was not raised. Contrary to Petitioner's contention, the court granted summary judgment because it concluded that "the outcome of Fowler's trial would not have been altered if he had been provided the tape recording, and not because the audio tape was not "newly discovered evidence." Thus, there was no substantive due process violation, which is what Respondents argued to begin with.

In the final analysis, all Fowler really complains about is that the district court granted Respondents' Motion for Summary Judgment. However, nowhere in his Petition does Fowler set forth one compelling reason why this Court should grant a writ of certiorari in such a case. He sets forth none because there is none. This Court's

time and resources would be better spent reviewing those cases of a character set forth in Rule 10 of this Court.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ISSUE A WRIT OF CERTIORARI BECAUSE NO QUESTION PRESENTED FOR REVIEW HERE WAS FIRST RAISED IN THE LOWER COURTS

None of the questions Fowler presents for review was raised in the district court or in the Eleventh Circuit. Only in "exceptional" cases will this Court review questions not presented or passed upon below.

> This court sits as a court of review. It is only in exceptional cases coming here from federal courts that questions not presented or passed upon below are reviewed.

Duigan v. United States, 274 U.S. 195, 200 (1927); *see also City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19 (1986); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Heckler v. Campbell*, 461 U.S. 458 (1958).

Of course, this is consistent with the policy behind Rule 10 of this Court. Cases must be of sufficient import for this Court to dedicate its scarce resources to passing upon them. And, it is unlikely that cases will be of such character where their issues have never been raised below.

Moreover, almost uniformly, the cases which this Court has considered "exceptional," justifying initial review in this Court, have concerned the rights of criminal defendants. *See, e.g., Clyatt v. United States,* 197 U.S. 207 (1905); *Wiborg v. United States,* 163 U.S. 632 (1896). Indeed, Respondents have been unable to find a single civil case which this Court found to be "exceptional."[1]

Notably, Fowler omits any argument that this case is "exceptional," warranting review of those issues not first presented below. The omission is understandable, however, as no exceptional circumstances exist. Consequently, Fowler's Petition should be denied.

II. SUMMARY JUDGMENT IS APPROPRIATE ON AN ISSUE NOT RAISED BY A MOVANT, IF THE MOVANT HAS OTHERWISE MET ITS BURDEN OF SHOWING THE COURT THERE IS NO GENUINE ISSUE OF MATERIAL FACT FOR TRIAL

In reaching the conclusion that Respondents did not violate Petitioners Substantive Due Process rights, the district court held:

---

[1] It has been suggested that this Court may exercise its review powers of questions not raised below *only* in criminal cases.

> We lack here the power occasionally exercised . . . to correct in criminal cases vital errors although the objection was not taken in the trial court. (cits. omitted).

Terminiello v. City of Chicago, 377 U.S. 1, 10 n. 1 (1949) (Frankfurter, J., dissenting).

> The totality of the evidence produced at Fowler's [State DUI] trial leads the court to the conclusion that there is not a reasonable probability that the result of Fowler's trial would have been altered if he had obtained the tape indicating that VanMeter did not give Fowler the implied consent warning.

(R-17, Order granting Motion for Summary Judgment, p. 12.) This was the precise issue raised by Respondents when they filed their motion for summary judgment. Almost as an afterthought, the district court also mentioned that because the existence of the tape was discovered during Fowler's criminal trial, the tape did not constitute "newly discovered evidence" under Georgia law. This secondary analysis, appropriately characterized as dictum, had no bearing on the court's decision.

At the same time, even if the district court had relied upon the "newly discovered evidence" theory as a basis for granting summary judgment, it would have been authorized to do so. Historically, federal courts have authorized summary judgment on grounds not advanced by a movant if the movant has otherwise successfully met its burden of showing there is no genuine issue of material fact for trial. *Broderick Wood Products Company v. United States,* 195 F.2d 433 (10th Cir. 1952); *Board of National Missions of Presbyterian Church in the United States v. Smith,* 182 F.2d 362 (7th Cir. 1950); *Wisnouse v. Telsey,* 367 F. Supp. 855 (S.D.N.Y. 1973). In *Board of National Missions* the Seventh Circuit noted:

> The plaintiff, therefore, contends that the District Court committed error in granting defendant's motion for summary judgment on the question of the construction of Rankin's Will.

> However, Rule 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that: 'the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'
>
> *In our opinion pleadings before the District Court did show that there was no genuine issue as to any material fact and also showed as a matter of law that the defendant was entitled to a summary judgment on his motion. The fact that the judgment was granted on a reason different from that assigned by the defendant is immaterial, where, as here, the motion was properly granted on the undisputed facts shown and on an issue presented by plaintiff's complaint.*

Id. 182 F. 2d at 364-65 (emphasis added).

Professors Wright and Miller have also provided their guidance to the subject:

> Once it is determined that there is no genuine issue as to any material fact and that a party is entitled to the benefit of a judgment as a matter of law, judgment should be entered even though the legal principles relied upon by the court may differ from those that have been urged by the litigants.

10A C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2725 at 112 (1983).

While it is true that Wright and Miller also suggest that a court should give appropriate notice to the parties that it intends to rule on an unraised issue so that the

non-moving party may be given an opportunity to present evidence, that reasoning does not apply here. This is because Fowler does not claim that had he been given notice that the district court intended to rule on the "newly discovered evidence" issue, he would have been able to offer admissible evidence precluding summary judgment. Rather, he simply argues that the district court was without power to grant summary judgment on a different issue than that raised in the motion. This is an incorrect statement of both the law and of what the district court did.

Moreover, the fact of the matter is that all of the evidence concerning the circumstances surrounding Fowler's DUI trial was clearly before the district court through the Criminal Trial Transcript, the depositions, responses to interrogatories, and other pleadings of record when it ruled. Thus, Wright and Miller's suggestion notwithstanding, the notice they recommend would have added nothing to Fowler's case. The district court was authorized to consider the issue, and appropriately ruled thereon.[2]

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[2] Respondents take issue with Fowler's contention that they have passively accepted the notion that the tape constituted "newly discovered evidence." Nothing could be further from the truth. Respondents do not believe the tape in any sense was "newly discovered evidence." Even if it were, Respondents do not consider the "newly discovered evidence" issue to be material to resolution of this case.

III. THE LOWER COURTS CORRECTLY CONCLUDED RESPONDENTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT FOR TRIAL AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

The salient issue in the trial court was whether there existed a reasonable probability Fowler's DUI trial would have turned out differently had he possessed at trial the tape which contained the allegedly exculpatory information. In that regard, Respondents successfully demonstrated there was no evidence to support Fowler's contention that he would have been acquitted had he been in possession of the tape at the time of his trial. At this point, the burden then shifted to Fowler to produce affirmative evidence showing a genuine issue of material fact which existed for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This, he was unable to do.

After thoroughly analyzing Georgia's DUI and evidence laws, the district court held:

> The existence of the tape would have only precluded the admission of the breath analyzer measurement of Fowler's blood-alcohol level (cit. omitted), and would not have affected the other evidence presented by the state. The court concludes that the outcome of Fowler's trial would not have been altered if he had been provided the tape recording indicating that he was not read his statutory rights prior to being administered the breath test.

(R-17, Order granting Motion for Summary Judgment, p. 10.) In short, even absent the results of the intoximeter

test performed on Fowler, he still would have been convicted.

On appeal to the Eleventh Circuit, Fowler contested the district court's order *only* to the extent the district court failed to consider an issue raised by Fowler at oral argument. At oral argument in the district court, Fowler claimed a genuine issue of material fact did exist because the audio recording also would have shown he was not less safe to drive after having admittedly drunk 2-3 beers that night. The tape, Fowler contended, would have shown he did not act belligerently to the officers, and that he also successfully recited his ABC's as part of his field sobriety tests. This evidence, the argument went, would have been so material as to change the outcome of the DUI trial. Fowler's factual and legal contentions simply were not, and are not, true.

It is absolutely clear that the tape would not have been probative on the issue of Fowler's belligerent behavior. This is because the testimony at trial was not that Fowler was acting beligerently *at the scene of his traffic stop*. Rather, the evidence concerning Fowler's belligerent behavior was that he acted this way *at the police station*, well after any recording occurred. (R-42, 43, Criminal Trial Transcript, pp. 31, 32.) No one, Fowler included, ever suggested there was an audio recording made at the police station. Thus, the tape would have had absolutely no probative value on this issue.

Fowler's second contention was that the tape would have been an audio recording of his field sobriety test wherein he attempted to recite his ABC's. Despite Fowler's claims to have "always disputed VanMeter's

statement that he [Fowler] could not recite his ABC's," the record is clear that Fowler *was* unable to recite them. On deposition, Fowler himself testified that he failed to get through the alphabet that night.

Q. He asked you to say your ABC's?

A. Yes.

Q. Now, you testified that you did it?

A. Yes, twice.

Q. A to Z?

A. A, b, c, d, e, f, g, h, i, j, k.

Q. A to Z and got all the way to Z?

A. *No, I always have a problem when I get down to o, u, q, r, s you know. I got to that area and then I tried it again for him, you know, he said, that's enough.*

Q. You had trouble around o, q, – ?

A. *Yeah, I always have a problem when I get down to q, u, r, s, t on my alphabet.*

(Fowler depo., p. 112) (emphasis added). Not even Fowler contradicts this testimony.

At best, then, the tape would have shown what Van-Meter testified to, i.e., that Fowler could not get through his ABC's. Rather than being exculpatory, the tape would have been supportive of the state's case and certainly would not have caused a different outcome at trial.

Finally, Fowler maintains that the state court trial judge charged the jury that in order to convict, it had to find both that Fowler was under the influence of alcohol

to the extent that it was less safe for him to drive *and* that his blood alcohol was 0.12% gm. or more. Thus, Fowler argues, had the intoximeter results been thrown out, he never would have been convicted. What Fowler misapprehends, however, is that had the intoximeter results not been introduced into evidence, the case simply would have gone to the jury with a different charge based solely on the fact that Fowler was less safe to drive. *See Curtis v. State*, 182 Ga. App. 388, 355 S.E.2d 741, 743 (1981). There is nothing to suggest the *result* would have been any different.

CONCLUSION

There is no reason this Court should accept this minor DUI offense turned federal constitutional claim for review. The issues presented, not properly being before this Court in the first instance, simply are not of the character to warrant review by this Court. The lower courts properly applied Fed. R. Civ. P. 56 in ruling Respondents were entitled to judgment as a matter of law. There was no genuine issue of material fact for trial, and Respondents showed that under the applicable law they were entitled to summary judgment.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS*
FOR THE ELEVENTH CIRCUIT

File No.: 93-8547

ROY LEE FOWLER
Appellant

v.

WAYNE VANMETER
DAVID H. KERR
and the
CITY OF WEST POINT
Appellees

Appeal from the
United States District Court
Northern District of Georgia

APPEAL BRIEF ON BEHALF OF ROY LEE FOWLER

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROY LEE FOWLER,	:	**File No.: 93-8547**
Appellant,	:	**Appeal from the United States District Court Northern District of Georgia**
v.	:	
WAYNE VANMETER, DAVID H. KERR, and the CITY OF WEST POINT,	:	
Appellees.	:	

APPEAL BRIEF ON BEHALF OF ROY LEE FOWLER

COMES NOW ROY LEE FOWLER, Appellant in the above entitled civil action, by and through his attorney of record, and files on his behalf this his APPEAL BRIEF to aid this Court in the resolution of the issues presented to it on appeal.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROY LEE FOWLER,	:	**File No.: 93-8547**
Appellant,	:	**Appeal from the United States District Court Northern District of Georgia**
v.	:	
WAYNE VANMETER, DAVID H. KERR, and the CITY OF WEST POINT,	:	
Appellees.	:	

CERTIFICATE OF INTERESTED PERSONS

1. The undersigned counsel of record for the Appellant herein certifies that the Honorable G. ERNEST TIDWELL, Judge of the United States District Court, Northern District of Georgia, was the district judge in this case.

2. The undersigned further certifies that the following is a full and complete list of all parties to this action:

ROY LEE FOWLER

WAYNE VANMETER

DAVID H. KERR

CITY OF WEST POINT, GEORGIA

3. The undersigned further certifies that the following is a full and complete list of all other persons, associations of persons, firms, partnerships, or corporations (including those related to a party as a subsidiary, conglomerate, affiliate, or parent corporation) having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case:

SCOTTSDALE INSURANCE COMPANY

TAXPAYERS OF THE CITY OF WEST POINT, GEORGIA

4. The undersigned further certifies that the following is a full and complete list of all persons serving as attorneys for the parties in this proceeding:

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Submitted this 2nd day of August, 1993.

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STATEMENT REGARDING ORAL ARGUMENT

In that this case centers around this Court's interpretation of the record, and not on the interpretation of law, the Appellant feels that this Court could be aided by

oral argument. The legal issues before this Court are fairly clear; the dispositive issue is whether the district court had a sufficient basis in the record for determining that there were no genuine issues of material fact.

Unlike cases turning on the interpretation of statutes or precedent, this case does not call upon this Court to determine the applicable law. Rather, all parties are in substantial agreement as to the applicable law. However, this Court is generally unfamiliar with the factual issues presented to it in this case on appeal. The Appellant feels that oral argument might aid this Court in focusing its attention on those relevant portions of the record relied upon for support of the contentions contained herein. The Appellant, therefore, requests oral argument be heard in this case before this Court.

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter as this is an appeal from a final judgment of the United States District Court for the Northern District of Georgia. Pursuant to U.S.C.A. § 28-1291, Roy Lee Fowler is entitled to an appeal of the entry of summary judgment by the

district court to the United States Court of Appeals as a matter of right.

STATEMENT OF THE ISSUES

As this appeal is from the entry of summary judgment by the district court, the appellant Roy Lee Fowler raises as his issue on appeal the validity of the district court's order. In challenging the validity thereof, the appellant enumerates the following issues which he contends were erroneously resolved by the district court: (1) whether the tape would have had an effect on the outcome of Mr. Fowler's trial; (2) whether the existence of the tape would be considered newly discovered since trial; and (3) whether there is sufficient evidence in the record to support Mr. Fowler's allegations. In general, Mr. Fowler contends that there do exist genuine issues of material fact, precluding summary judgment.

STATEMENT OF THE CASE

Proceedings and Dispositions Below

Roy Lee Fowler ("Fowler") filed an action in the United States District Court for the Northern District of Georgia on January 22, 1992, alleging the violation of his civil rights by the Defendants (Appellees) under the color of law (R1-1-1); Fowler filed suit under U.S.C.A. § 42-1983 showing that the actions of the Defendants served to deprive him of his civil rights (R1-1-4). The relevant basis of the action was the Defendant Wayne Vanmeter's ("Vanmeter") arrest of Fowler and subsequent prosecution. Fowler alleged that Vanmeter had intentionally

destroyed evidence which was exculpatory in nature resulting in Fowler's being convicted of a crime (R1-1-2).

The Appellees, Vanmeter, David H. Kerr ("Kerr"), and the City of West Point, Georgia, ("West Point"), filed a Motion for Summary Judgment in the District Court on September 1, 1992, after the close of discovery (R1-10-1). Judge G. Ernest Tidwell of the United States District Court granted the Motion for Summary Judgment by Order on April 21, 1993 (R2-17-13). It is from that order of the district court that Fowler filed his timely Notice of Appeal in Accordance with Rule 3 of the Federal Rules of Appellate Procedure (R2-19-1).

Statement of the Facts

In the early morning hours of August 20, 1989, Roy Fowler and his girlfriend Connie Sue Rupe ("Rupe") met a couple of friends in a lounge in Lanett, Alabama. (R2-Exhibit 4-66, 108) Fowler and Rupe subsequently left the lounge and followed the other couple into West Point, Georgia, with Fowler driving his red Ford truck. (R2-Exhibit 4-67, 72, 73, 74) Shortly after entering West Point, Fowler was pulled over by Vanmeter purportedly because of Fowler's failure to signal a turn and of his following another car too closely. (R2-Exhibit 7-12)

Vanmeter approached Fowler's truck and in so doing smelled what he perceived to be the smell of alcohol. (R2-Exhibit 7-15) For this reason, Vanmeter decided to have Fowler perform two field sobriety tests: recitation of the alphabet and standing on one (1) foot. (R2-Exhibit 7-14, 15, 16; R2-1-10-Exhibit B-8, 9) Although Fowler disputes Vanmeter's assertion (R2-Exhibit 4-75, 112, 113, 114, 115,

123, 195), Officer Vanmeter claims that Fowler failed the two field sobriety tests. (R2-Exhibit 7-14, 15, 16) For this reason, Vanmeter decided to take Fowler to the police station so that a breath analysis might be performed. (R2-Exhibit 7-17, 18) Once again a dispute between Fowler and Vanmeter arises. Vanmeter claims to have read Fowler his implied consent rights (O.C.G.A. § 40-6-392); Fowler insists that no such right were ever read him. Nevertheless, once at the station, the breath test was administered and Fowler registered a .15 gm. % blood alcohol content. (R2-Exhibit 6-5; R1-10-Exhibit C-9) Based on this chemical test result and personal observation, Vanmeter charged Fowler with driving under the influence (DUI) and placed him under arrest.

Fowler contested the DUI charge and his trial commenced in the State Court of Troup County on March 13, 1990. (R1-10-Exhibit B) During cross examination of Officer Vanmeter, it was suggested that there might in fact be an audio recording of the traffic stop of Mr. Fowler. (R1-10-Exhibit B-18, 19) The attorney for Mr. Fowler did not seek a subpoena or continuance to obtain this potential evidence. Over objection of counsel for Mr. Fowler, evidence of the breath analysis was submitted to the jury as evidence. (R1-10-Exhibit B-43) In addition, Vanmeter offered testimony of his observations of Mr. Fowler at the scene. (R1-10-Exhibit B-8, 9) The trial jury found Fowler guilty of DUI. (R1-10-Exhibit B-106)

Fowler filed a Motion for New Trial. (R1-10-Exhibit D-1). One of the bases for his motion for new trial as argued was newly discovered evidence. (R1-10-Exhibit D-27). The evidence to which he pointed was the audio recording of the traffic stop which was provided by

Office Vanmeter under subpoena. (R1-10-Exhibit C-12). The audio tape did not, however, have recorded on it the aforementioned traffic stop of Mr. Fowler. (R1-10-Exhibit D). Fowler's motion for new trial was denied. (R1-10-Exhibit D). He appealed his conviction and the denial of his motion for new trial to the Court of Appeals of Georgia. (R1-10-Exhibit D). His appeal failed, *Fowler v. State*, 200 Ga.App. 505, 408 S.E.2d 449 (1991), and Mr. Fowler served the sentence which was imposed on him.

Statement of the Standard of Review

This appeal is from the entry of summary judgment by the district Court. This Court reviews grants of summary judgment *de novo. Hutcherson v. Progressive Corp.*, 984 F.2d 1152 (11th Cir. 1993). This Court will not weigh evidence to resolve factual disputes; rather, if a genuine issue of material fact is found, summary judgment will be denied. *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521 (11th Cir. 1991). Roy Lee Fowler, the Appellant herein, has asked this Court to reverse the entry of summary judgment by the district court and remand this case to the district court for a trial by jury.

SUMMARY OF THE ARGUMENT

In moving for summary judgment, the moving party must come forward with depositions, answers to interrogatories, admissions on file, affidavits, and other evidence to demonstrate to the district court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. If the moving party is able to persuade the district court

accordingly, the nonmoving party must come forward with similar evidence and demonstrate the existence of a genuine issue of material fact. If such an issue is found, summary judgment is generally precluded.

In presenting their motion for summary judgment, the defendants herein attempted to show that there were no such genuine issues. First the defendants alleged that Mr. Fowler's claims were barred by the doctrine collateral estoppel, issue preclusion. In so arguing, the defendant attempted to characterize this civil action as a rehash of the issue decided by the Georgia Court of Appeals in the appeal of Mr. Fowler's DUI conviction. However, the district court correctly distinguished this case from the Georgia appeal as Mr. Fowler's constitutional claims of due process were not a part of the Georgia court's decision, nor did they need to be.

The defendants next argued that Mr. Fowler would not be able to prove his allegations at a trial. This argument comes from the provision of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), which allows a moving party who does not have the burden at trial to show to the court that the nonmoving party who has the burden at trial will not be able to prove an essential element of his complaint. However, the district court correctly determined that there was sufficient circumstantial evidence to infer the allegations contained in Mr. Fowler's complaint. Thus, the district court rejected this argument by holding that Mr. Fowler could conceivably prove his allegations at a trial.

The defendants and the district court both argued that even had the tape been provided in an unaltered condition, and had it shown those facts which Mr. Fowler

said it would have, the outcome of the trial would not have been altered. The district court's analysis was, however, flawed in that the court misread the Georgia DUI law and the relevant portions of the trial transcript. Rather, the hypothetically unaltered tape would have impacted the trial to such a degree that it would have been unlikely that the same verdict would have resulted. Additionally, the district court incorrectly concluded that the existence of the tape was not newly discovered evidence since trial and as such, Mr. Fowler did not have an available remedy. Both of these analyses are flawed and should be corrected by this Court.

ARGUMENT AND CITATION OF AUTHORITY

The Applicable Law of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provide for the entry of summary judgment in cases where there does not exist a significant issue of fact for a jury to decide at a trial. Specifically, Rule 56(c) states that when a party can demonstrate tot the trial court that "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law", then summary judgment is appropriate. Rule 56(e) goes on to note the defense required by the nonmoving party who opposes the motion. It states:

> **When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by**

> **affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.**

It was under this rule that the defendants made their motion for summary judgment which the district court granted.

The long controlling precedent in federal summary judgment practice has been the decision of the United States Supreme Court in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1969). The *Adickes* case affirmed the view that, on a motion for summary judgment, the moving party must always bear the initial burden of persuasion regardless of how the burden would be situated at a trial. In the *Adickes* case, a white school teacher was refused service in a lunchroom operated by S. H. Kress & Co. when she was accompanied by six black students. She filed a federal civil rights complaint under U.S.C.A. § 42-1983, the same code under which this case was filed. The district court granted Kress's motion for summary judgment stating that Adickes had failed to allege any facts from which a conspiracy might be inferred. The Court of Appeals affirmed, but the Supreme Court reversed.

The Supreme Court in *Adickes* determined that the moving party had failed to meet its burden of persuasion in showing the absence of a genuine issue of material fact. In the *Adickes* case, the Court held that because the moving party had failed to foreclose the possibility that the police and store owners were in conspiracy, a jury could infer such a relationship and rule for the Plaintiff. Thus, the Court in *Adickes* required that the party moving for summary judgment must persuasively foreclose the possibility that a jury would return a verdict for the

plaintiff. The standard set by *Adickes* was difficult for any moving party to surmount. Schwarzer, Hirsh, and Barrans (1991) have noted that the stringent requirement of the *Adickes* case made it very difficult for summary judgment to be had in cases.

The same commentators have suggested that the infrequent use of summary judgment procedures following *Adickes* was the Supreme Court's motivation for reinvigorating the procedure in 1986 is a trio of cases. The case most frequently cited by Courts and the commentators regarding summary judgment standards today is *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This is the case most heavily relied upon by the district court in the present matter. The other members of the trio of cases were *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In the *Celotex* decision, the Court held that if the party moving for summary judgment did not bear the burden of proof at trial, then the moving party did not need to negate every essential element of the nonmoving party's case. Rather, the Court held, if the above situation is present, then the moving party need discharge its burden only by demonstrating the absence of an essential element of the case of the party bearing the burden at trial. Hence the moving party's burden is "discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. The Court, therefore, gave party's not bearing the burden of proof at trial an easier avenue for supporting their motion for summary judgment.

In the *Anderson* case, the Court held that only those disputes over facts which might legitimately affect the outcome are material within the definition in the Rule. Thus, the court defined the material facts requirement of the Rule. The Court further, in *Anderson,* enunciated a test for determining whether a genuine issue of a material fact existed. The Court applied the same test as traditionally applied to motions for directed verdict: whether the evidence is sufficient to sustain a verdict for the nonmoving party. Finally, in applying the test, the Supreme Court required that the district court review the evidence in the light most favorable to the nonmoving party and assess its sufficiency according to the evidentiary burden of the controlling substantive law.

Finally, in the *Matsushita* case, the Court upheld the entry of summary judgment in an antitrust case involving an alleged conspiracy to fix unreasonably low prices. This case is primarily interesting for it allows the entry of summary judgment in cases alleging conspiracies were motivations, intentions, and states of mind are relevant issues. Prior to the *Matsushita* case, it was a general rule that only a jury was in the position needed to resolve issues of intent, motive, and state of mind. However, the Court held in *Matsushita* the a case need not go to a jury if plaintiffs produce not direct evidence of a conspiracy, and that merely an inference of conspiratorial and unlawful conduct for circumstantial evidence was insufficient.

These three cases have received a great deal of discussion throughout the federal judiciary and by the commentators. Nelken (1988) in reciting the relevant summary judgment standard enunciated by *Celotex* has

mentioned two ways a moving party could meet its initial burden if it did not have the burden at trial. She applies both the *Celotex* and *Anderson* cases in her summary. She concludes:

> **A moving party may meet its initial burden in either of two ways: (1) by producing affirmative evidence to negate an essential element of the nonmoving party's case, or (2) by "showing" the court, after appropriate time for discovery, that the record is devoid of legally sufficient evidence to establish an essential element of the nonmoving party's case. (Nelken, p. 82)**

This is the situation in the case at bar, a moving party not bearing the burden of proof at trial. Nelken also questioned the Court's use of a directed verdict standard in the there are "practical differences created by the fact that summary judgment, unlike directed verdict, is sought before the nonmoving party has attempted a full presentation of its case." (Nelken, p. 65)

The shift in the Supreme Court's position on summary judgment in 1986 was not unnoticed by the federal judiciary. In fact, Issacharoff and Lowenstein (1990), in an empirical study, demonstrated the dramatic upsurge in the use of summary judgment of motions following the trio of cases above. Of course, with so many different courts and commentators considering the issue of summary judgment, numerous interpretations of the Supreme Court's opinions were made. It was in an effort to clarify the disagreements over the initial burden of the moving

party on a motion for summary judgment the this Eleventh Circuit decided the case *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991).

In the *Clark* case, this Court held that the *Adickes* case is still the generally applicable rule governing motions for summary judgment. This Court held that the *Celotex* cases, and the other two in the trio, merely clarified the decision in *Adickes*. In this regard, the court held that "*Celotex* involved an unusual situation." *Clark*, 929 F.2d at 607 (11th Cir. 1991) The court in *Clark* restated that the moving party always bears the initial burden to show that there are no genuine issues of material facts which need resolution at a trial. And, only after such a showing, does the burden shift to the nonmoving party to show the existence of a genuine issue of material fact precluding summary judgment. Going further, this Court in *Clark* held:

> **under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial. *Clark*, 929 F.2d at 608 (11th Cir. 1991)**

It should be noted that in evaluating a motion for summary judgment, even one of the *Celotex* and *Clark* varieties, the district court is bound to view all of the evidence in the light most favorable to the nonmoving party and "resolve all reasonable doubts about the facts

in favor of the non-movant." *Browning v. Peyton*, 918 F.2d 1516, at 1520 (11th Cir. 1990)

Chin (1992) has reviewed the *Clark* decision and supports the position taken by this Eleventh Circuit in that case. His arguments are generally opposed to the expansion of the use of summary judgment, especially if the sole purpose is to clear the court's calendars and deny access to the court system to litigants merely to easily dismiss legitimate claims. In arguing in favor of the *Clark* decision, Chin cites the subjective issues of intent. He notes:

> **Prior to *Celotex*, courts generally would not grant summary judgment when the disputed issues turned on subjective factors such as intent, knowledge, or motivation. This changed after *Celotex*, when courts not only revised the level of the movant's initial burden, but also displayed a willingness to resolve issues of intent or motive on summary judgment. In *Clark*, however, the Eleventh Circuit correctly reaffirmed the need for caution before deciding issues of intent of summary judgment. (Chin at 1021)**

This Eleventh Circuit has therefore taken the position that summary judgment must be employed with great caution.

Along similar lines, this Court decided *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991). This cases, brought by the United States, was a civil forfeiture suit against property purchased by a convicted drug dealer. After the district court granted summary judgment for the claimant, the government appealed. This

Eleventh Circuit, sitting *en banc*, vacated the entry of summary judgment by the district court holding that the determination of whether or not the property was purchased with drug money was a genuine issue of material fact precluding summary judgment.

As a summary of the requirements for the entry of summary judgment, it can be said summary judgment in inappropriate if there is a genuine issue of material fact. Summary judgment is therefore precluded if, when taking all of the evidence on file in a light most favorable to the nonmoving party, there exists sufficient evidence from which a jury could return a verdict for the nonmoving party. In *Hutcherson v. Progressive Corporation*, 984 F.2d 1152 (11th Cir. 1993), this Court has held that all reasonable inferences must be drawn in favor of the nonmoving party and that the court may not weight the evidence to resolve factual disputes on a motion for summary judgment. Rather, this court has held that if a genuine issue of material fact is found, summary judgment must be denied.

Issacharoff and Lowenstein (1990) have argued strongly against the use of summary judgment in general. They have, through empirical studies, found that to begin with, easing the standards of summary judgment motion has adverse consequences for the ability of parties to settle cases where summary judgment motion have been made and denied. Secondly, these researchers have found that summary judgment "fundamentally alters the balance of power between plaintiffs and defendant by raising both the costs and risks to plaintiffs in the pretrial

phases of litigation while diminishing both for defendants." (p. 75) And finally, these researchers found evidence which suggests that "liberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class." (p. 75)

The issue in this case is, of course, did Judge Tidwell apply the correct standard of summary judgment to his decision. The order entered by the district court did not cite *Adickes*, the generally applicable rule, but rather cited the *Celotex* and *Anderson* cases which offered the exception to *Adickes*. The district court's summary of the summary judgment standard is generally accurate, albeit somewhat incomplete. The district court does define the standard which it applies when it writes:

> **Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof and (2) the summary movant has made a plausible showing of the absence of evidence on the necessary element. (R2-17-6, 7)**

In support of this statement, the district court cites *Celotex*. It can therefore be said that, assuming the validity of the district court's interpretation, *if* the nonmoving party has the burden of proof at trial as to an essential element of his case, *if* the moving party makes a plausible showing that there is an *absence* of evidence to support the essential element, and *if* the nonmoving party fails to come forward with specific evidence which support the essential element, *then* summary judgment is appropriate.

As to the issues now before this Court, the Appellant Roy Lee Fowler, as the nonmoving party in the district court, contends that the above scenario does not apply to this case. Although Fowler does not deny that he has the burden of proof at trial, he does argue that the moving party on the motion for summary judgment in this case failed to adequately show the absence of supporting evidence to the district court. Additionally, Fowler contends that he did come forward anyway with specific evidence from which a reasonable juror could return a verdict in his favor. Thus, his contention is that summary judgment, by the standard applied by the district court, and by the standard enunciated herein above, was inappropriate in this case.

The Decision of the District Court

Although the defendants in their motion for summary judgment raise five or six issues for the court to determine, Judge Tidwell's Order addressed only three of those. First, the defendants had argued that Fowler's claims were barred by collateral estoppel (R1-10-12(Brief)). The defendants argued that the issues being litigated in the present case were equivalent to those before the Georgia Court of Appeals in *Fowler v. State*, 200 Ga.App. 505, 313 S.E.2d 100 (1991). The district court correctly rejected this argument holding that the constitutional issues of due process and compulsory process in this case were not, in fact, resolved by the Georgia Court (R2-17-8). Therefore, the district court held that collateral estoppel was not a bar to Fowler's claim. The second argument made by the defendants was the Fowler had no evidence to support his allegation that Vanmeter intentionally erased the tape of his stop (R1-10-17). The

district court correctly rejected this argument also by ruling that "the evidence arguably permits the inference that Vanmeter taped the stop of Fowler and later erased the tape." (R2-17-9).

Nevertheless, when the district court addressed the third argument raised by the defendants, it found sufficient justification for the entry of summary judgment. The third argument made by the defendants was that even if Vanmeter intentionally erased the tape, Fowler still received a fair trial and his due process rights were not violated. (R1-10-21). In analyzing this argument, the district court assumed that the erased tape would have supported Fowler's contentions. (R2-17-10). Nonetheless, the district court agreed with the defendants and entered summary judgment against Fowler.

There are generally two arguments made by the district court in support of its conclusion that Fowler's rights were not violated. First, the district court concluded "that the outcome of Fowler's trial would not have been altered if he had been provided the tape recording indicating that he was not read his statutory rights prior to being administered the breath test." (R2-17-10). Secondly, the district court concluded that "the existence of the tape and the fact of its erasure" does not qualify as newly discovered evidence under Georgia Law. (R2-17-11) Based on its determination of these two issues, the district court granted the defendant's motion for summary judgment. As this Court reviews entry of summary judgment de novo (*Hutcherson*), Fowler briefly summarizes his position on those issues decided to his favor by the district court and then proceeds to argue his

position on those issues decided against him by the district court.

The Doctrine of Collateral Estoppel

The parties and the district court are all in agreement as to the four elements which must be presented in order to invoke the doctrine of collateral estoppel:

> **1. the issue sought to be precluded must be identical to the one involved in the prior litigation;**
>
> **2. the issue must have actually been litigated in the prior litigation;**
>
> **3. the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action; and**
>
> **4. the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.**
>
> ***Boozer v. Higdon*, 252 Ga. 276, 277-8, 313 S.E.2d 100 (1984).**

In accordance with Fowler's arguments, the district court found the first and third of these requirements to be dispositive on this issue. (R2-17-7)

The defendants had argued that the issues raised in the present litigation were identical to those raised in the case of *Fowler v. State*, 200 Ga.App. 505, 408 S.E.2d 449 (1991), decided by the Georgia Court of Appeals. However, as the district court noted, the Georgia Court of Appeals ruled only on the admissibility of the breath test

against Fowler, and the denial of Fowler's motion for new trial. (R2-17-7) The Georgia Courts did not address the constitutional issues of due process and compulsory process raised by Fowler in this action. Further, the district court ruled that the constitutional issues, in addition to not being mentioned by the Georgia Court, was not a critical and necessary part of its opinion. Accordingly the district court ruled that collateral estoppel was not a bar to Fowler's claims.

The Evidence Permits the Inference that Vanmeter Recorded The Stop of Fowler and Subsequently Erased the Tape

The defendants asserted in their brief to the district court that Fowler did not have evidence showing that the defendants intentionally deprived him of his rights. (R1-10-17) Thus, the defendants argued that Fowler's claim did not rise to the level of a substantive due process violation. (R1-10-17). The primary focus of their argument was that there was no evidence of intent on the part of Vanmeter. (R1-10-18, 19, 20). The defendants cited the case of *Daniels v. Williams*, 474 U.S. 327 (1986), which held that merely the negligent conduct of government (i.e. law enforcement) officials did not rise to the level of a due process violation. Thus, the defendants demanded that Fowler proffer some evidence to prove intent. (R1-10-17).

While intent is one of those elusive elements which courts had generally refused to consider on motions for summary judgment, the *Matsushita* case and the general liberalization of the summary judgment rule allows questions of intent to be considered. However, Fowler did in

fact come forth with evidence in support of his contention the Vanmeter intentionally erased the tape. In support of his contention that Vanmeter erased the tape, Fowler pointed the district court to Vanmeter's inability to explain the blank portions on the tape (R2-Exhibit 7-52, 53), the presence of Vanmeter's voice on the tape stating "erasing some of the tape" (R2-Exhibit 7-52, 53), the inconsistent statements of Vanmeter about the existence of the tape (R2-Exhibit 7-82; R2-Exhibit 6-18; R1-10-Exhibit B-18), and the testimony of the plaintiff's expert witness.

The acknowledgment of the Defendant Vanmeter that the voice on the tape was his stating "erasing some of the tape", combined with his failure or unwillingness to explain the blank space on the applicable portion of the tape, and his insistence that he had never replayed or examined the tape from the time it was made until delivered to his superior officer (R2-Exhibit 7-46, 47, 53, 59) offer circumstantial evidence (words, conduct, demeanor, motive, etc.) from which a rationale trier of fact may infer intent. The various discrepancies in the testimony of Vanmeter support the inference that Vanmeter taped the traffic stop, failed to read Fowler his rights, and subsequently and intentionally erased the tape. This inference is further bolstered by the testimony of Mr. Robert Powers, an expert in the field of audio-visual equipment and recording.

Mr. Powers, an audio engineer and expert in the field, examined a copy of the tape as it was produced with the erased portion. Mr. Powers testified as to various elements of sound present on the tape. His findings indicate, for one that the portion of the tape with the

stops temporally before and after Fowler both contain an "anomaly" (R2-Exhibit 9-20). His explanation for this anomaly was a weak set of batteries (R2-Exhibit 9-18, 22). However, the same anomaly does not occur in the summary of the Fowler arrest and the erased portion of the tape. (R2-Exhibit 9-22) Power's concluded that the summary and the erasure were effected with either a clean set of batteries or an AC power source. (R2-Exhibit 9-22) Power's further testified that he believed that two tape machine were involved in the modification which occurred on the tape due to an analysis of the pink noise. (R2-Exhibit 9-23). Clearly these facts and opinions infer an intent on the part of Mr. Vanmeter.

Mr. Robert Powers, the audio engineer, therefore concluded that an intentional erasure had occurred on the tape. He states "I call it an intentional erasure because someone for – someone for an excess of two minutes of time has placed the machine in record holding it." (R2-Exhibit 9-21) Although it is true that Mr. Powers was unable to identify if there was anything underneath the intentional erasure (R2-Exhibit 9-29, 30, 132, 134), much less unable to identify what it was, his testimony does support the claims of Mr. Fowler. Thus, additional inferential evidence is offered by Mr. Powers to suggest that Vanmeter did record the traffic stop and later intentionally erase it.

The district court ruled on the side of Fowler on this issue by stating "The evidence arguably permits the inference that Vanmeter taped the stop of Fowler and later erased the tape." (R2-17-9) Thus, the district court found a issue of material fact (i.e., the intentional erasure) which

would need resolution by a trier of fact. Unfortunately for Mr. Fowler, the district court wrongly determined that this issue was not genuine for it would not effect the outcome of the case. (R2-17-10) In support of this conclusion the district court return to the actual trail in the State Court of Troup County. (R1-10-Exhibit B) That is, therefore, where we return.

The Outcome of Fowler's Trial Would Have Been Altered Had He Been Provided the Tape Recording of His Traffic Stop In an Unaltered Condition

The defendants, in their motion for summary judgment, argued that even if the evidence permits the inference that Vanmeter intentionally erased the tape, there was still not due process violation for Fowler received a "fair trial". (R1-10-21 thru 26) The defendants argued that even if the tape had shown Mr. Fowler's contention, there still would have been sufficient evidence to sustain a conviction. (R1-10-25). In support of this argument, the defendants relied upon the other evidence in the record which tended to show Mr. Fowler's intoxicated condition on the night in question. (R1-10-25) The defendants cited the applicable law of DUI in Georgia as upholding a conviction for Mr. Fowler even with the addition of the tape in a hypothetically unerased condition. (R1-10-24, 25)

The district court, in analyzing this argument, assumed that Vanmeter taped the traffic stop of Fowler and later erased it. Further, the district court assumed that the tape would have indicated exactly what Mr. Fowler claims, that he was not read his statutory implied consent rights in violation of O.C.G.A. § 40-6-392.

(R2-17-10) Thus, the district court concluded that had the tape been unaltered, presented at trial, and indicative of Mr. Fowler's claims, then the evidence of the breath analysis would have been excluded. (R2-17-10). This is the appropriate result of being charged with DUI and not being read the statutory rights: an exclusion of the chemical analysis. See, for example, *Perano v. State*, 250 Ga. 704, 300 S.E.2d 668 (1983). However, the district court inaccurately concluded that the tape would have no bearing on the other evidence of intoxication offered by the State.

As to this other evidence, both the defendants and the district court contended that the other evidence of Fowler's intoxicated state, to wit: not being able to stand on one leg, not being able to recite the alphabet, his belligerent attitude toward the police, his personal appearance, and the smell of alcohol on his breath, would have been sufficient to conclude that Fowler was in fact under the influence of alcohol. (R1-10-25; R2-17-11). Further, they contend that the evidence of Fowler's following another car too closely and failing to signal a turn suggest that he was less safe to drive a car due to his condition. (R2-17-11). From this evidence, the district court concluded that the outcome of the trial would not have been altered.

However, the district court incorrectly identified Mr. Fowler's position with regard to the tape's bearing on the other evidence of intoxication. The court states: "Fowler does not contend that the admission of the tape at trial would have affected the remainder of the evidence of intoxication proffered by the state." (R2-17-10). That statement is an incorrect representation of Mr. Fowler's contention.

In oral argument before the district court, it was brought to the Court's attention that the tape would have a highly probative impact on the rest of the evidence of intoxication for the tape would have been

> **a recording of his voice, and it would also be a recording of a sobriety test, at least an audio portion of it, a sobriety test that he was allegedly given, where he is alleged to made to stand on one foot, touch his nose, and recite his ABC's and this type of thing. (R3-18)**

In this regard, the tape could have demonstrated to the jury if in fact Mr. Fowler was speaking belligerently or incoherently to the police officers as has been alleged. (R1-10-25; R3-18). Further, Mr. Fowler has always disputed Vanmeter's statement that he could not recite his ABC's (R2-Exhibit 4-112, 123, 195); rather, Fowler has contended that he had difficulty getting through them and that Mr. Vanmeter interrupted him in the process. So in addition to the proof that Mr. Fowler was not read his implied consent rights, the tape would have proven invaluable in bolstering Mr. Fowler's contentions that he was not in fact less safe to drive.

It should also be pointed out to this court that both the defendants and the district court inaccurately portray the hypothetical outcome of Mr. Fowler's trial had the breath test not been admitted. A careful reading of the trial transcript, however, reveals that in her charge to the jury Judge Little stipulated the requirement that in order to return a verdict of guilty, the breath test must be considered. Her charge states:

> **Now, Ladies, if after considering the testimony and the evidence which has been presented to**

> **you together with the charge of this Court, you should find and believe beyond a reasonable doubt that this defendant in Troup County, Georgia, did on or about the 20th day of August, 1989, then and there unlawfully *drive or be in actual physical control* of a motor vehicle while under the influence of alcohol to the extent that it was *less safe* for the person to drive *and* the person's *blood alcohol concentration* was 0.12 or more, then you would be authorized to find this defendant guilty. And in that event the form of your verdict would be: We, the jury, find the defendant guilty. (emphasis added) (R1-10-Exhibit B-101, 102)**

In that the jury, bound by the charge of the Court, returned a verdict in the form "We, the jury, find the defendant guilty," one can only suppose that the did in fact consider both pieces of information: the less safe provision and the blood alcohol content provision.

The defendants, however, suggested to the district court that under Georgia law one can be convicted under either the less safe provision or the technical violation of a chemical test. (R1-10-22, 23). As persuasive authority, the defendants cited the case of *Love v. State*, 195 Ga.App. 392, 393 S.E.2d 520 (1990) as having held that one can be charged under both of the provisions of less safe and blood alcohol content but only convicted on one. That is not exactly a correct reading of *Love*. In *Love*, the Georgia Court of Appeals held that Love, who was convicted of being under the influence of alcohol while driving a car and having a blood alcohol content of greater the .12 grams while driving a car, had in fact received two equivalent DUI conviction for the same act. Thus, the Court of

Appeals held that this was a violation. The court did not, however, state that a jury could not use both pieces of evidence to hand down one charge of DUI. This latter alternative was the one used in Mr. Fowler's trial.

As cementing evidence of the actual intent of the trial court to direct the charge given, Mr. Fowler would note his attorney's question of the charge after the jury had gone out. Mr. Fowler's attorney suggested to the court that because the accusation against Mr. Fowler accused him of all of the three requirements above (driving or in control; less safe; and blood alcohol content) that her charge should have reflected those requirement. (R1-10-104, 105). Mr. Kirby, the Solicitor, stated that "It was clear to me your Honor instructed the jury that they must find each and every material allegation of the accusation beyond a reasonable doubt. And you read the accusation." (R1-10-105). Thus, the State Court and the prosecuting attorney clearly believed that if a verdict of guilty was returned, it would necessarily be predicated on all three requirement of the accusation; the jury had to rule on both the less safe to drive and blood alcohol content provisions. Thus, the defendants suggestion that Mr. Fowler would have been convicted of DUI even without the use of the breath analysis is flawed. (R1-10-25)

Obviously, Mr. Fowler's trial and his subsequent conviction were substantially based on the admission of his breath analysis. Recalling the district courts method of analysis, the evidence arguably suggests that the breath analysis would have been excluded from the trial had the tape not been erased. Further, the district court concluded that the evidence arguably permits the inference that the

erasure of the tape was intentional. In light of the record, the defendants statement that "Had the intoximeter test results not been introduced into evidence in Fowler's trial for DUI, he would nonetheless have been convicted" (R1-10-26) is not supported.

If the district court seriously considers the function of an unaltered tape which supports Mr. Fowler's claim, then it must conclude that Mr. Fowler would have, in fact, been acquitted by the jury, if he was even brought to trial by the state. The outcome of his trial would, therefore, have been substantially different had the exculpatory evidence not been destroyed. The District Court cited the case of *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) in concluding that "in order for the exclusion of exculpatory evidence to give rise to a due process violation, the defendant must show that there is a 'reasonable probability . . . that the outcome of the proceedings would have been different.' " (R2-17-10) Clearly, the record reflects that had the exculpatory evidence been made available, the outcome of the trial would have, in all likelihood, been different. At any rate, the above argument reflects the existence of a genuine issue of material fact requiring a trial by jury for resolution.

The Existence of the Tape and the Fact of Its Erasure Were Newly Discovered Evidence Under Georgia Law

The final contention of the district court decided to the disfavor of Mr. Fowler was the issue of whether or not the existence of the tape qualified as newly discovered evidence under Georgia Law. (R2-17-11, 12) It is the Mr. Fowler's contention that it does. The defendants have

argued, however, that because the existence of the tape was discussed at the trial, it cannot be considered newly discovered evidence. The district court agreed with this assertion. (R2-17-11).

Both the district court and the defendants therefore contend that one of the following approaches should have been used by Mr. Fowler's attorney in the criminal trial: either (a) Mr. Fowler's attorney should have filed a Brady motion demanding the disclosure of exculpatory evidence (R3-24) or (b) Mr. Fowler's attorney should have stopped the trial in midstream, issued a subpoena for the tape, and sought a continuance from the trial judge (R2-17-12). Neither one of these options was employed. Thus this Court is asked to determine whether the existence of the tape would be considered newly discovered evidence under Georgia law and whether Mr. Fowler's rights to the exculpatory evidence were waived by the failure of his attorney to file a Brady motion or seek a continuance.

From the onset, the Georgia law regarding newly discovered evidence has not been in dispute. The Georgia Supreme Court has affirmatively set the standard in *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980). Applying that caselaw, the district court held:

> **Under Georgia law, newly discovered evidence is evidence which (1) has come to the defendant's knowledge since the trial; (2) provided that it was not owing to the want of due diligence that he did not acquire it sooner; (3) and that it is so material that it would probably produce a different verdict; (40) that it is not cumulative only; (5) that the affidavit of the**

> **witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted in the only effect of the evidence will be to impeach the credit of a witness. All six requirement must be complied with to secure a new trial. (R2-17-11)**

It can be assumed from the previous argument concerning the role of the tape in a trial in its unaltered form, that requirements three, four, and six would be met: a different verdict would most likely result from the addition of exculpatory, highly probative evidence. Requirement five does not apply. That leaves only the first and second requirements. On both of these, the direct court ruled to the disfavor of Mr. Fowler. (R2-17-11, 12).

(1) "has come to defendant's knowledge since the trial"

In deciding this issue, the trial court stated that the existence of the tape was discussed during the cross examination of Vanmeter. (R1-10-Exhibit B-18, 19). The entire discussion of the tape trial was actually very short. The cross examination of Mr. Vanmeter by Mr. Fowler's attorney with regard to the tape is actually very short; it reads, in relevant portion:

* * *

Q. Did you have it with you that night?

A. I'm not sure if I had it on me or not. I ain't been long purchased the tape. I'm really not sure.

* * *

Q. Do you have the tape with you today to play to the jury –

A. No, sir.

Q. – about where you supposedly read these right to Mr. Fowler?

A. No, sir, but I have got it at home.

Q. You have got it at home?

A. I've got if it I had the tape – if I had the tape, I've got it at home.

* * *

(R1-10-Exhibit B-18, 19)

When considered in light of the rest of Mr. Fowler's defense and the other issues the his attorney was attempting to highlight, the fact that he made a mental note to later request the tape and forgot, certainly does not constitute a waiver.

This Court must evaluate the record as a whole. Thus, in a transcript of a State Court misdemeanor trial, this Court needs to consider the desire of all parties to hurry the trial along without unnecessary delays and lawyer tactics. In this regard, it is unreasonable to expect the defense attorney to act upon every possible contingency which arises during the course of the trial. Courts do not generally view the action of an attorney in hindsight when mistakes are noticeable and errors replete.

It should be pointed out to this Court that neither the State Court Judge on the motion for new trial (R1-10-Exhibit D-2-1 thru 13), nor the Georgia Court of Appeals had a difficulty with calling the tape newly discovered evidence *Fowler v. State*, 200 Ga.App. 505, 408 S.E.2d 449

(1991). Their reasoning for not granting the new trial was that the tape, *as discovered,* was not sufficient to overturn the conviction (R2-12-8). Recalling the discovery of the tape, it had already be erased when it was presented to the court on the motion for new trial.

The questions concerning the existence of the tape abound. Why did Officer Vanmeter not bring the tape with him to trial if in fact he had it at home? Why was Officer Vanmeter unable to recall whether or not the tape actually existed? Why did Officer Vanmeter not offer to bring the tape voluntarily to Court? All of these questions indicate the never, at any point in the trial, was the actual existence of the tape confirmed. The testimony was that there may have been. Can this Court interpret such vague hypotheticals as "if I had the tape, then it might be at my home", as discovery in the legal sense.

The existence of the tape was not discovered at the trial. What was discovered at the trial was a veiled possibility that the tape might exist. (R1-10-Exhibit B-18, 19). The district court was therefore misreading the record when it asserted that the tape "was not discovered 'since trial.' " (R2-17-12). For this assertion, the district court cites the case of *Foreman v. State,* 200 Ga.App. 400, 408 S.E.2d 178 (1991). However, in *Foreman,* the court determined that the existence of a witness (i.e., a living human being) was discovered during the trial. The Georgia Court held that "The transcript from the trial and the motion for new trial are replete with evidence that defendant knew about the witness at trial, if not prior to trial." *Foreman,* 408 S.E.2d at 179. Clearly, the actual existence of an actual person is much more meaningful than the possible existence of a tape recording, at least in the trial of a

criminal case. And it should be noted, that no one, not the defendants nor the district court, has termed the transcript of the trial "replete with evidence that defendant knew" about the tape.

The circumstances surrounding the revelation of the tape during the trial can be used to infer that the "existence" of the tape was not known at the trial. The issue is not, therefore, as unambiguous as the district court believed. If this Court follows its practice in summary judgment proceedings as construes every conceivable inference to the favor of the nonmoving party, it will certainly see that a genuine issue of a material fact exists as to when, in fact, the existence of the tape and its subsequent erasure was discovered.

(2) "it was not owing to the want of due diligence that he did not acquire it sooner"

The district court argued in its Order that "once Fowler discovered the possible existence of the tape at trial, 'due diligence' required that he at least try to obtain the tape to determine its content during the trial." (R2-17-12). The court argued that Fowler could not know about the tape and wait until after his trial to complain about it. (R2-17-12) Rather, the district court concluded, Fowler should have sought a continuance and issued a subpoena for the tape during the trial. (R2-17-12) in support of this conclusion the district court notes that Fowler had "become aware of the tape's *likely* existence during trial" (emphasis added) (R2-17-12). As stated above, the

existence of the tape, according to Mr. Vanmeter's testimony, was anything but likely. The district court contends that Fowler could have at the very least requested a continuance but did not do so.

If Mr. Fowler had requested a continuance what would have happened. For one, it would have been denied. Georgia criminal procedure, O.C.G.A. § 17-8-20 *et seq.*, leaves the decision to grant a continuance in a criminal trial largely in the hands of the trial judge. (O.C.G.A. § 17-8-22) Common exposure to the legal system is convincing that State Court misdemeanor trials proceed at a very fast pace and that judges in these trials loathe delays and stalling tactics. Had the actual existence of the tape been made known to the Court, it might have granted a motion for continuance. However, the vague hypotheticals used by Mr. Vanmeter did not contain any such evidence of the tapes actual existence. Thus, the trial court would, in all likelihood, have denied a continuance.

The denial of the continuance would have had the same effect as that had during the real trial when no such motion was made. On the other hand, had the continuance been granted, it is likely that Mr. Vanmeter would have presented the court with an erased tape. How can the conclusion be justified? Well, recalling that for the purposes of this newly discovered evidence debate it is assumed that Vanmeter recorded the stop, and later erased the tape intentionally. (R2-17-10). If that is the case, then Mr. Vanmeter was obviously willing to destroy evidence which, for these purposes, we can assume was exculpatory. (R2-17-9, 10). If he was willing to erase the tape prior to submission, it would be immaterial to him if the submission of the erased tape had occurred during

the trial or at the motion for new trial. In either event, the effect would have been the same: to deny Mr. Fowler exculpatory evidence which would have likely prevented his conviction.

The defendants have tried to characterize the existence of the tape as Brady material. The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Thus, the defendants contend that Mr. Fowler should have filed a Brady motion to uncover the tape prior to the trial. Once again, for this debate, it can be assumed that Mr. Vanmeter recorded the stop, it demonstrated exactly what Mr. Fowler claims, and Mr. Vanmeter subsequently erased it (R2-17-9, 10). How likely does it seem that Mr. Vanmeter would have complied with the requirements of Brady? He certainly had no sense of fundamental fairness. If he was willing to deny the tape to Mr. Fowler after the trial, he would have certainly been just as willing to deny it prior to or during the trial.

This court is therefore forced to consider a number of procedural issues. Did Mr. Fowler, by not seeking a continuance and not filing a Brady motion, fail to use due diligence in obtaining the tape. As already indicated the existence of the tape was not known during the trial. However, Mr. Fowler did attempt to discover the tape. His attorney asked Mr. Vanmeter about the existence of the tape. Thus, Mr. Fowler's attorney was using due diligence to try and uncover if in fact there was a tape.

However, he ran into a wall when Mr. Vanmeter refused to say whether a tape did or did not exist. (R1-10-Exhibit B-18, 19). The questioning itself shows that Mr. Fowler used due diligence to uncover the existence of the tape but that said existence did not come to his knowledge during the trial.

Thus, because the tape's existence did not come to Mr. Fowler's knowledge until after the trial although he had used due diligence to try and uncover it, the requirements of *Timberlake* and the district court are satisfied. (R2-17-11) The tape would, therefore, have been considered newly discovered evidence, as the Georgia courts were willing to treat it. Further, this Court must, in making all reasonable inference to the favor of Mr. Fowler, assume that the tape would have shown that Mr. Fowler was not read his implied consent warning (R2-17-9, 10), and further, that he was not acting, at least verbally, in a drunken intoxicated manner. (R3-18). With these assumptions it can be reasonably concluded that Mr. Fowler would have received his new trial and had his conviction overturned. Mr. Vanmeter's erasure of the tape can thus be said to have violation Mr. Fowler constitutional rights.

Summary Judgment Inappropriate

Mr. Fowler has demonstrated above that there is in fact evidence to support his assertion that Mr. Vanmeter intentionally erased the tape recording of Mr. Fowler's traffic stop. Further, Mr. Fowler has demonstrated that the effect of the tape, had it been in an unaltered condition, would have been to overturn his conviction for DUI.

Finally, Mr. Fowler has shown this Court that the existence of the tape would have been newly discovered evidence under Georgia law and would have resulted in his receiving a new trial. The district court acted inappropriately, therefore, when it granted the defendants motion for summary judgment in concluding "that there are no genuine issues of material fact which could be determined in Fowler's favor that would allow Fowler to prevail on his claim for the unconstitutional denial of exculpatory evidence." (R2-17-13). Such a holding is inaccurate and incomplete in the light of the record and the above arguments. In this case, summary judgment was inappropriate.

CONCLUSION

Because there are genuine issues of material fact as laid out above, summary judgment is inappropriate in this case. The district court inappropriately entered summary judgment for the defendants (appellees), and this Court has been asked to reverse the district court and remand this case back to the district court for a trial by jury.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served the within and foregoing Appeal Brief on Behalf of Roy Lee Fowler upon the Counsel of Record for the Appellees, by depositing a true and correct copy of the same in the United States Mail, in a securely wrapped envelope, with adequate postage thereon to ensure delivery to them at the following addresses:

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This the 2nd day of August, 1993.

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